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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 593

OLIVER CLEVE RYLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 35-38) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 29, 1948 (R. 38-39), and a petition for rehearing (R. 39-40) was denied January 27, 1949 (R. 40). The petition for a writ of certiorari was filed February 24, 1949. The jurisdiction of

this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

Petitioner was indicted for illegal sales of narcotics. The evidence showed that the sales were made to an informer acting under the direction of a government agent. On cross-examination of the informer, defense counsel drew an admission that the sales probably would not have been made but for the informer's insistence. Petitioner did not take the stand and offered no evidence in his own defense.

The principal question presented is whether the trial court committed reversible error (a) in denying petitioner's motion for acquittal on the ground that the evidence showed that he had been entrapped by government agents, and (b) in charging the jury that, in determining the issue of petitioner's guilt or innocence, they should not consider the evidence bearing upon the alleged entrapment.

A subsidiary question is whether the indictment sufficiently charged an offense under the statute.

STATUTE AND RULES INVOLVED

Section 2 of the Harrison Narcotic Act, as amended (sec. 2554 of the Internal Revenue Code; 26 U. S. C. 2554), provides in pertinent part:

> (a) *General requirement.* It shall be unlawful for any person to sell * * * [any opium

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derivative] except in pursuance of a written order of the person to whom such article is sold, * * * on a form to be issued in blank for that purpose by the Secretary.

* * * * *

(f) *Supply.* The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them * * *.

Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

A two-count indictment was filed against petitioner in the District Court for the Eastern District

of Oklahoma charging that on two separate occasions he executed sales of opium derivatives to one Darrell Brown, not in pursuance of a written order "on a form prescribed and furnished by the Collector of Internal Revenue," in violation of Section 2 of the Harrison Narcotic Act (R. 1-2). After a jury trial, he was convicted on both counts (R. 2) and was sentenced to imprisonment for three years on each, the sentences to run concurrently (R. 4-5). The judgment was affirmed by the Court of Appeals for the Tenth Circuit (R. 38-39).

The first witness at the trial was Theodore Hagstrom, a federal narcotic agent, who began his testimony by stating that he knew Darrell Brown, that he knew petitioner, and that he made an investigation of opium sales by petitioner in Ada, Oklahoma, in August 1947 (R. 6-7, 8). The following then occurred (R. 7):

> Q. What preparation did you make in connection with these sales?
>
> Mr. Wadlington [Defense Counsel]: If the court please, we will object to that. It is not shown this defendant will be connected.
>
> The Court: Overruled.
>
> A. Information was received from the Chief of Police——
>
> The Court: Don't tell what your information was.
>
> A. We secured the services of Informer Brown and on August 18th he advised me——
>
> Mr. Wadlington: If the court please, we object to proving the case that way.

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The Court: Leave out the hearsay. You know the difference between hearsay and other evidence.

The witness then testified that on August 18 and August 20, 1947, he searched Brown, gave him money, and then observed him purchase narcotics from petitioner (R. 7-10). In neither instance did Brown have a proper order form (R. 11). On cross-examination, Hagstrom admitted that Brown was an addict and that he was paid living expenses by the Government while acting as an informer in narcotics cases (R. 11-12, 15). On redirect examination the following occurred (R. 15):

Q. Why did you employ an addict to assist you in making this investigation?

Mr. Wadlington: We object to that, your honor.

The Court: I will let you argue that.

Apparently the objection was sustained after argument, for the prosecutor abandoned that line of questioning.

Brown, the informer, then took the stand as a witness for the Government and testified as to the two purchases he had made from petitioner (R. 16-18). On cross-examination, Brown stated that just prior to the investigation of petitioner, he had been in jail in Tulsa, Oklahoma, on a robbery charge involving a taking of narcotics; that the federal agents secured his release on bond so that he could assist them in the Ada investigation; that

he was later convicted and sentenced to 10 years' imprisonment on the robbery charge and was presently serving that term; and that agent Hagstrom brought him to Ada and directed him to try to get evidence against petitioner (R. 18-21). The following then occurred (R. 22):

> Q. You talked to Ryles numerous times during the two or three weeks you were here?—A. Yes, sir.
>
> Q. You were with him a good bit?—A. Well, I suspect Cleve and I were together a couple of dozens times, almost every day.
>
> Q. And it was you who insisted on him selling you some dope, wasn't it?—A. Well, yes. I offered to buy some.
>
> Q. He was persuaded by you to sell you some dope, is that right?—A. I don't know whether he was definitely persuaded by me to sell me the dope or not. I want to be fair in answering your question. I did insist on it, yes.
>
> Q. If you hadn't insisted on it he never would have sold you the dope, would he?—A. No, I don't think so.
>
> Q. He wasn't trying to sell it, was he?—A. Well, I couldn't truthfully answer that question. I don't know. He didn't approach me and ask to sell it to me.
>
> Q. You did that on both occasions that you were able to obtain these articles from him?—A. Well, yes. Yes I did.

Q. As far as you know this man never would have committed any offense or done anything against the law if it hadn't been for Mr. Hagstrom and you?

Mr. Summers [United States Attorney]: I object to that.

Q. That is right?—A. I presume it as far as I know. I don't know that he would or would not.

On redirect examination, Brown stated that agent Hagstrom had given him the names of certain people, including petitioner, who were suspected of selling narcotics in Ada, but further questioning along this line was again cut short by a defense objection (R. 22-23).

The testimony as to the sales by petitioner was further corroborated by the Chief of Police of Ada and by a Government chemist (R. 23-26).

Petitioner did not take the stand, nor did he present any other evidence in his own defense. Instead, defense counsel moved at the close of the Government's case that the charges be dismissed and that a verdict of not guilty be directed on the ground that the evidence showed that petitioner had been entrapped by the government agents. The motions were denied. (R. 27.)

The court instructed the jury on the presumption of innocence, reasonable doubt, the credibility of the witnesses, and the weight to be given their testimony (R. 28-29, 30-31). The court further

instructed the jury that they were not to consider the propriety of the methods used to secure the evidence against petitioner (R. 30):

> The argument has been made to you, and I think I should give you an instruction in regard to that, that it isn't proper to convict a man upon this kind of evidence by reason of the manner in which it was obtained, or that it isn't fair. I believe the attorney used that argument. That is not a problem for the jury to determine. You are not asked whether or not this defendant ought to be convicted under the circumstances in this case, except as it involves the problem of whether or not the evidence that has been permitted to come to you by the court is such as convinces you beyond a reasonable doubt that he did that with which he is charged. If this evidence is not proper to sustain a verdict of guilty that is the court's problem, not a jury problem. I am telling you now there isn't anything in this case that precludes you from returning a verdict of guilty against this defendant by reason of the manner in which they went about obtaining this evidence. The sole question for you is, does the evidence convince you beyond a reasonable doubt that the defendant made the sale to this witness? If it does you should convict him. If that isn't proper, fair or reasonable I have to look after that, not you. You are the fact finders in this case. Did he make the sale or didn't he make the sale? The law is my problem. You assume your responsibility and I

will assume mine, and return your verdict accordingly.

What I have just told you does not detract at all from your right to determine the weight and credibility of the witnesses. What I am telling you, it is not the function of the jury to determine the problem of using this kind of testimony.

There is nothing in the record to indicate that defense counsel requested an instruction on entrapment, and when, at the conclusion of the charge, the court asked, "Anything I have overlooked?" (R. 31) defense counsel raised no objection. Not until the filing of a motion for new trial, five days after verdict, was objection made to the court's failure to instruct the jury on entrapment (R. 3).

DISCUSSION

It is clear that the affirmative defense of entrapment is available to a defendant in a criminal case where he can show that the criminal design originated not with himself but with the government officers, and that, although he was of an innocent predisposition, the officers instigated, persuaded, or otherwise induced him to commit the crime. *Sorrells* v. *United States,* 287 U. S. 435, 441-452, and authorities cited. It is also clear that, in order to require the trial court to submit the issue of entrapment to the jury, the defendant must meet the affirmative burden of presenting substantial evidence from which the

jury could find the necessary elements of entrapment. *Flynn* v. *United States*, 57 F. 2d 1044, 1046 (C.A. 8), certiorari denied, 287 U.S. 627; *Polski* v. *United States*, 33 F. 2d 686 (C.A. 8), certiorari denied, 280 U.S. 591; *Corcoran* v. *United States*, 19 F. 2d 901 (C.A. 8); *Vamvas* v. *United States*, 13 F. 2d 347 (C.A. 5); *Scriber* v. *United States*, 4 F. 2d 97 (C.A. 6); cf. *Davis* v. *United States*, 160 U.S. 469; *Holloway* v. *United States*, 148 F. 2d 665, 666 (C.A. D.C.).

Petitioner makes two alternative contentions with respect to the issue of entrapment. He contends, first, that the testimony given by the informer, Brown, conclusively established entrapment by the government agents, and that the trial court should have granted a judgment of acquittal. We believe this contention cannot succeed. Brown admitted that he had "insisted" that petitioner sell him some narcotics, and he stated that he did not think the sales would have been made to him without such insistence. But he also testified that petitioner was suspected of being in the business of selling narcotics illegally. (R. 22-23.) Consequently, Brown's testimony cannot be regarded as so conclusive on the issue of entrapment as to have required the trial court to enter a judgment of acquittal.

Petitioner's second contention is that the evidence was such that the trial court should at least have instructed the jury on entrapment, and that

its failure to do so constituted such plain error as to require reversal, despite the fact that no such instruction was requested and no objection was made to the charge as given. The Court of Appeals agreed that under Rule 52, F. R. Crim. P. (*supra,* p. 3), an error in the charge, even though not objected to, may require a new trial if the defendant's substantial rights have been affected. But the court went on to say: "conceding that the Government's evidence is susceptible to an inference of entrapment justifying submission of that issue to the jury, we are yet unable to say in these circumstances that failure to do so was plain error, resulting in a miscarriage of justice" (R. 38).

As has been pointed out, "the defense of entrapment is not simply that the particular act was committed at the instance of government officials. * * * The predisposition and criminal design of the defendant are relevant." *Sorrells* v. *United States, supra,* at 451. In order to require submission of an issue of entrapment to the jury, there must be substantial evidence that the defendant's predisposition was that of an innocent man, some proof that the criminal intent was implanted in his mind by the government officers, and not merely that the criminal act was the result of the affirmative action of government agents. Concededly, Brown's testimony would have supported a finding that petitioner sold the narcotics to Brown at

the instance of the government officers. However, petitioner offered no evidence of innocent predisposition. The Court's opinion in the *Sorrells* case states that the "controlling question" is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials", and that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." (287 U. S. at 451.)

If the defendant in this case had come forward with evidence as to the innocence of his predisposition, thus squarely seeking to establish the defense of entrapment, the prosecution would have been put clearly on notice that it should meet this issue by cross-examination and through rebuttal. In addition, defense counsel effectively blocked every opportunity of the prosecution to show that, prior to the sales to Brown, the agents had information upon which to base a reasonable belief that petitioner was actively engaged in peddling narcotics (*supra,* pp. 4-7). In these circumstances, it is questionable whether petitioner could "take the contradictory attitude of claiming that [there was] evidence in support of that issue [entrapment] and at the same time insist that the prosecution be denied the right to introduce evidence to defeat

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it." *Corcoran* v. *United States,* 19 F. 2d 901, 903 (C. A. 8).

However, upon consideration of all the circumstances of this case, the Government has doubts as to whether the issue of entrapment was sufficiently canvassed at the trial. We believe that the interests of justice would be served by permitting this case to be re-tried in order to give the court and the parties an opportunity to explore the issue of entrapment fully and have all the relevant evidence presented. The record in its present posture does not contain an adequate evidentiary basis upon which the issue of entrapment should be considered and decided.

Accordingly, the Government consents that the judgment of the Court of Appeals should be vacated forthwith, without further briefs or argument, and the cause be remanded to the District Court for a new trial.[1]

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.

APRIL 1949.

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[1] Petitioner also contends that the indictment failed to allege an offense under the statute. The statute punishes all sales of opium derivatives except in pursuance of an order on a form issued by the Secretary of the Treasury (26 U. S. C. 2554, *supra,* pp. 2-3). The Secretary has delegated the power

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to issue such forms to the Commissioner of Internal Revenue. *Nailling* v. *United States*, 142 F. 2d 551 (C. A. 6), certiorari denied, 316 U. S. 675. The present indictment alleged that sales had been made by petitioner not in pursuance of an order on a form "prescribed and furnished by the Collector of Internal Revenue" (*supra*, p. 4). Petitioner argues that no offense was stated because the indictment named the "Collector" instead of the "Commissioner." The statute, however, specifically provides that the forms shall be furnished to prospective purchasers by the various collectors (26 U. S. C. 2554(f), *supra*, p. 3). We think there is no possibility that petitioner was misled or handicapped in preparing his defense by this description of the crime, nor is there any possibility that he could be subjected to another prosecution for the same offense. *Kinnison* v. *United States*, 158 F. 2d 403 (C.A. D.C.), certiorari denied, 330 U. S. 834; *Cromer* v. *United States*, 142 F. 2d 697, 698 (C.A. D.C.), certiorari denied, 322 U. S. 760; *Nailling* v. *United States*, 124 F. 2d 431, 142 F. 2d 551 (C.A. 6), certiorari denied, 316 U. S. 675.

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